Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor (No 2)

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 24–828 OF 1994
MOHD GHAZALI J
3 JULY 1997

Civil Procedure *— Government proceedings — Application for certificate for the payment of judgment sum — Plaintiffs obtained judgment against state government — Defendant lodged an appeal but did not obtain a stay of execution — Whether certificate could be issue notwithstanding that appeal was pending — Government Proceedings Act 1956 ss 18, 30 & 33(1) — Courts of Judicature Act 1964 s 73*

The plaintiffs filed an originating summons in the High Court claiming certain reliefs against the defendants. In December 1995, the learned judge who tried the proceedings ('the trial judge') ordered that the defendants pay the plaintiffs the sum of RM26.5m as compensation. Since the defendants failed to pay the judgment sum, on 5 March 1997, the plaintiffs applied for an order that a certificate be issued to the plaintiffs as prescribed in s 33 of the Government Proceedings Act 1956 ('the GPA') for the payment of the judgment sum. The defendants filed their affidavit and stated therein that they had filed a notice of appeal against the decision of the trial judge but were informed that their appeal had yet to be registered as the High Court Registry could not trace the notice of appeal. The defendants submitted that since there was an appeal pending against the decision of the trial judge, the court should not issue the certificate.

The senior assistant registrar ('the SAR') allowed the plaintiffs' application and issued the certificate on the ground that there was no record of any appeal being filed by the defendants. The defendants appealed. Meanwhile, vide a letter dated 6 May 1997, it was informed that the missing notice of appeal had been traced and forwarded to the Registrar of the Court of Appeal.

Counsel for the defendants argued that the certificate should only be issued if the judgment was final and conclusive and all avenues for appeal had been exhausted. He contended that the SAR was wrong in issuing the certificate since they had produced documentary evidence to show that they had filed an appeal against the decision of the trial judge. On the other hand, counsel for the plaintiffs argued that s 33(1) of the GPA was mandatory in the absence of a stay.

The issue to be determined at this appeal was whether the certificate could be issued notwithstanding that an appeal was pending against the decision of the trial judge.

Held, dismissing the appeal:

From a reading of s 33(1) of the GPA, the ingredients that must be present before a certificate can be issued are: (i) an order has been

made by the court in favour of the applicant; and (ii) the order is against the government or against an officer of the government.

Section 33(1) of the GPA should be read together with ss 18 and 30 of the same Act. Further, since s 73 of the Courts of Judicature Act 1964 provides that an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders, and since there was no record that the defendants had obtained a stay of execution, it could not be contended that the SAR had made a wrong decision when he issued the certificate. Section 73 clearly applies to proceedings by or against the government and, that being so, it could not be contended that the certificate could only be issued if the judgment was final and conclusive and all avenues for appeal had been exhausted. The certificate could be issued notwithstanding an appeal had been filed by the defendants unless at the hearing of the application before the SAR, the defendants had obtained a stay of execution.

The reason that the SAR gave for allowing the application, ie that there was no record of any appeal being filed by the defendants, had no bearing upon the matter before him. Pursuant to s 33(1) of the GPA, he had to issue the certificate since the application was made after the expiration of 21 days from the date of the order of the trial judge. Since there was no order for a stay, neither was there a direction from the court that the payment be suspended, it could not be said that the certificate issued by the SAR was inappropriate or wrong in law (see pp 438B–C, I and 439A–E, H–I).

[Bahasa Malaysia summary

Plaintif-plaintif memfailkan satu saman pemula di Mahkamah Tinggi menuntut relief tertentu terhadap defendan-defendan. Dalam bulan Disember 1995, hakim yang arif yang membicarakan prosiding ('hakim perbicaraan') memerintahkan supaya defendan-defendan membayar jumlah sebanyak RM26.5 juta kepada plaintif-plaintif sebagai pampasan. Oleh kerana defendan-defendan gagal membayar jumlah penghakiman, pada 5 Mac 1997, plaintif-plaintif memohon suatu perintah bahawa suatu sijil dikeluarkan kepada plaintif-plaintif seperti yang disyaratkan dalam s 33 Akta Prosiding Kerajaan 1956 ('APK') untuk bayaran jumlah penghakiman. Defendan-defendan memfailkan afidavit mereka dan menyatakan di dalamnya bahawa mereka telah memfailkan satu notis rayuan terhadap keputusan hakim perbicaraan tetapi diberitahu bahawa rayuan mereka belum lagi didaftarkan kerana Pejabat Pendaftaran Mahkamah Tinggi tidak dapat mengesan notis rayuan. Defendan-defendan menghujahkan bahawa memandangkan terdapat rayuan yang menunggu penyelesaian terhadap keputusan hakim perbicaraan, mahkamah tidak harus mengeluarkan sijil itu.

Penolong kanan pendaftar ('PKP') membenarkan permohonan plaintif-plaintif dan mengeluarkan sijil atas alasan bahawa tiada rekod tentang mana-mana rayuan yang difailkan oleh defendan-defendan. Defendan-defendan merayu. Sementara itu, menerusi sepucuk surat

bertarikh 6 Mei 1997, ia diberitahu bahawa notis rayuan yang hilang telah dijumpai dan dikemukakan kepada Pendaftar Mahkamah Rayuan. A

Peguam defendan-defendan menghujahkan sijil harus dikeluarkan hanya jika penghakiman adalah muktamad dan terakhir dan segala jalan untuk rayuan telah digunakan. Beliau menghujahkan bahawa PKP adalah salah dalam mengeluarkan sijil kerana mereka telah B mengemukakan keterangan dokumentar bagi menunjukkan mereka telah memfailkan satu rayuan terhadap keputusan hakim perbicaraan. Sebaliknya, peguam plaintif-plaintif menghujahkan bahawa s 33(1) APK adalah mandatori dalam ketiadaan penggantungan.

Isu untuk ditentukan di rayuan ini adalah sama ada sijil itu boleh dikeluarkan tanpa mengira suatu rayuan terhadap keputusan hakim C perbicaraan sedang menunggu penyelesaian.

Diputuskan, menolak rayuan:

Dari bacaan s 33(1) APK, unsur-unsur yang mesti hadir sebelum sesuatu sijil boleh dikeluarkan adalah: (i) suatu perintah telah dibuat D oleh mahkamah memihak kepada pemohon; dan (ii) perintah tersebut adalah terhadap kerajaan atau terhadap seorang pegawai kerajaan.

Seksyen 33(1) APK harus dibaca bersama dengan ss 18 dan 30 Akta yang sama. Seterusnya, oleh kerana s 73 Akta Mahkamah Kehakiman 1964 memperuntukkan bahawa suatu rayuan tidak harus E beroperasi sebagai suatu penggantungan pelaksanaan atau prosiding di bawah keputusan yang dirayu melainkan mahkamah bawah atau Mahkamah Rayuan memerintah demikian, dan oleh kerana tiada rekod bahawa defendan-defendan telah memperolehi penggantungan pelaksanaan, ia tidak boleh dihujahkan bahawa PKP telah membuat F keputusan yang salah apabila beliau mengeluarkan sijil itu. Seksyen 73 dengan jelasnya terpakai kepada prosiding oleh atau terhadap kerajaan dan oleh yang demikian, ia tidak boleh dihujahkan bahawa sijil itu hanya boleh dikeluarkan jika penghakiman adalah muktamad dan terakhir dan segala jalan untuk rayuan telah digunakan. Sijil itu boleh dikeluarkan tanpa mengambil kira satu rayuan telah difailkan oleh G defendan-defendan melainkan di pembicaraan permohonan di hadapan PKP, defendan-defendan telah memperolehi penggantungan pelaksanaan.

Alasan yang diberikan oleh PKP dalam membenarkan permohonan, iaitu tiada terdapat sebarang rekod tentang apa-apa H rayuan difailkan oleh defendan-defendan, tidak berkaitan dengan perkara di hadapan beliau. Menurut s 33(1) APK, dia harus mengeluarkan sijil itu kerana permohonan dibuat selepas tamatnya tempoh 21 hari dari tarikh perintah hakim perbicaraan. Oleh kerana tiada perintah untuk penggantungan, tidak juga terdapat perintah dari mahkamah bahawa bayaran digantung, ia tidak boleh dikatakan I bahawa sijil yang dikeluarkan oleh PKP adalah tidak wajar atau salah di sisi undang-undang (lihat ms 438B–C, I dan 439A–E, H–I).]

Notes

For cases on government proceedings, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1413–1421.

Legislation referred to

Courts of Judicature Act 1964 s 73
Interpretation Acts 1948 and 1967 s 66
Government Proceedings Act 1956 ss 2(1), 18, 30, 33, 33(1), 33(3)
Rules of the Court of Appeal 1994 r 18(7)
Rules of the High Court 1980 O 73 r 12(1)

Zainal Adzam Abdul Ghani (State Legal Adviser) and *Abdul Rasid Sudin* (Federal Counsel) for the appellants/defendants.

S Kanawagi, *RR Sethu* and *R Rajasingam* (*Khana & Co*) for the respondents/plaintiffs.

Mohd Ghazali J: On 4 October 1994, the plaintiffs filed an originating summons in the High Court at Johor Bahru claiming for the following reliefs against the defendants:

(i) a declaration that all the lands acquired by the defendants for the purpose of constructing the Sungei Linggui Dam near Kota Tinggi, Johor is aboriginal area or aboriginal reserve;

(ii) an order that the defendants jointly or severally pay to the plaintiffs all the compensation received by them from the Government of Singapore or a sum deem just by the court; and

(iii) costs.

Prayer (ii) above was subsequently amended to read:

> ... for a declaration that the plaintiffs are entitled to be paid the sum of RM320m or a portion thereof as deems fit by this honourable court.

On 19 December 1995, the learned judge who tried the proceedings ('the trial judge') ordered that the defendants pay the plaintiffs the sum of RM26.5m as compensation with no order as to costs (see [1997] 1 MLJ 418).

On 5 March 1997, by way of an ex parte summons in chambers, the plaintiffs applied for an order 'that a certificate be issued to the plaintiffs in this action as prescribed in the Government Proceedings Act 1956 s 33 for the payment of the judgment sum of RM26.5m awarded by this honourable court in this action on 19 December 1995 to the plaintiffs against the first defendant, Kerajaan Negeri Johor and the second defendant, Pengarah Tanah Dan Galian, Negeri Johor' ('the application' and 'the certificate' respectively). In their affidavit in support of the application, the plaintiffs stated that on 7 January 1997, their solicitors wrote to the defendants requesting that the judgment sum be paid forthwith and since there was no response, hence the application.

Section 33 of the Government Proceedings Act 1956 ('the GPA') reads: A

(1) Where in any civil proceedings by or against the Government or in any proceedings under Chapter VIII of the Specific Relief Act 1950, or in any such proceedings as would in England be brought on the Crown side of the Queen's Bench Division, or in connection with any arbitration to which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order: B C

Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the person for the time being named in the record as the advocate for the Government or for the Government department or officer concerned. D

(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the appropriate Government shall, subject as hereinafter provided, pay to the person entitled or to his solicitor the amount appearing by the certificate to be due to him together with the interest, if any, lawfully due thereon: E

Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such directions to be inserted therein. F

(4) Save as aforesaid no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government or any officer of the Government as such, of any such money or costs. G

(5) This section shall apply both in relation to proceedings pending at the commencement of this Ordinance and in relation to proceedings instituted thereafter. H

The application was fixed for hearing before the learned senior assistant registrar ('the SAR') on the same day, ie 5 March 1997 who then ordered that it be heard inter partes and directed the plaintiffs to serve the summons on the defendants. I

On 20 March 1997, the defendants filed their affidavit and stated therein that they have filed a notice of appeal on 29 December 1995 against the decision of the trial judge but have yet to receive any response

A from the High Court Registry, Johor Bahru. Consequently, they made enquiries with the Registry and were informed that their appeal had yet to be registered as the Registry could not trace the said notice of appeal. That being so, they insisted that the plaintiff's application is inappropriate as the defendants are still pursuing the appeal although they could not proceed B further until the matter of the missing notice of appeal and its non-registration is resolved.

The application was heard on 25 March 1997 and on 12 April 1997, the SAR allowed the application and issued the certificate. On 17 April 1997, the defendants filed an appeal against the decision of the SAR to the judge in chambers. In his grounds of decision, the SAR stated that the C defendants had submitted before him that since there is an appeal pending against the decision of the trial judge, the court should not issue the certificate. However, as he (the SAR) could not trace from the Registry any record of an appeal being lodged by the defendants, he held that there was 'no valid justification' to deny the plaintiffs 'the fruits of the judgment D which they had obtained on 19 December 1995'. The appeal against the decision of the SAR came up for hearing before me on 19 June 1997.

It must be noted here that meanwhile, vide a letter dated 6 May 1997, the Deputy Registrar of the High Court, Johor Bahru forwarded to the Registrar of the Court of Appeal a copy of the defendants' notice of appeal which was filed on 29 December 1995, ie the missing notice of E appeal had since been traced.

At the appeal before me, the learned State Legal Adviser who appeared for the defendants argued that the certificate should only be issued if the judgment is final and conclusive and all avenues for appeal have been exhausted. He contended that the SAR was wrong in issuing the certificate F since they have produced documentary evidence to show that they have filed an appeal against the decision of the trial judge but could not proceed further, ie to file the record of appeal at the Registry of the Court of Appeal within six weeks in accordance with r 18(7) of the Rules of the Court of Appeal 1994, as the Registry had not responded and furthermore could G not even trace the notice of appeal until recently. He also pointed out that he had even applied to the Court of Appeal for an extension of time to file the memorandum of appeal but there was no response since he could not cite any appeal registration number.

The State Legal Adviser then submitted that although s 73 of the Courts of Judicature 1964 provides that 'an appeal shall not operate as a H stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders', O 73 r 12(1) of the Rules of the High Court 1980 provides that 'nothing in Orders 45– 52 shall apply in respect of any order against the Government', ie all the rules on enforcement of judgments and orders and consequently execution, are I not applicable.

In his reply, counsel for the plaintiffs argued that s 33(1) of the GPA is mandatory in the absence of a stay. He submitted that although the certificate issued can be suspended as provided for by s 33(3) of the same

Act, any suspension could only be made by the original court, ie the trial judge who adjudicated upon the matter or the Court of Appeal. He then contended since there was no order for a stay before the court, the appeal against the decision of the SAR should be dismissed.

In my view, the only issue which need to be determined at this appeal is whether the certificate can be issued notwithstanding that an appeal is pending against the decision of the trial judge. From my reading of s 33(1) of the GPA, the following ingredients must be present before a certificate can be issued, namely:

(a) an order has been made by the court in favour of the applicant, which in this case are the plaintiffs; and

(b) the order is against the government or against an officer of the government.

Section 2(1) of the GPA provides that the word 'order' includes 'a judgment, decree, rule, award or declaration'. The same section also provides that the word 'Government' includes 'the Federal Government and the Governments of the States'.

The said s 33(1) provides that on an application — made after the expiration of 21 days from the date of the order — by the party who has obtained the order in his favour, the proper officer of the court shall issue to that person a certificate in the prescribed form containing the particulars of the order. A copy of the certificate issued may be served upon the advocate for the government or for the government department or officer concerned. If the order provides for the payment of any money by way of damages or otherwise, the certificate shall state the amount so payable and upon receipt, the appropriate government shall pay to the person entitled or to his solicitor the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon.

Notwithstanding the above, the proviso to s 33(3) of the GPA provides that:

> *The court by which any such order as aforesaid is made* or *any court to which an appeal against the order lies* may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has been issued may order any such directions to be inserted therein. (Emphasis added.)

It is not disputed by the parties that the SAR falls within the contemplation of the words 'proper officer of the court' found in s 33(1) of the GPA. That being so, what need to be determined at this appeal is whether he was right in issuing the certificate. Counsel for the plaintiffs contended that the provision is mandatory and since more than 21 days have elapsed since the date of the order of the trial judge, the SAR had to issue the certificate. In reply, the learned State Legal Adviser argued that since he has lodged a notice of appeal, it was inappropriate for the SAR to issue the certificate.

In relation to the above contentions, I am of the view that s 33(1) of the GPA should be read together with ss 18 and 30 of the same Act. The said sections read:

A 18 Subject to this Act, the written law relating to procedure shall apply to civil proceedings by or against the Government in the same way as to suits between subject and subject.

30 Subject to this Act, all written laws and rules of court relating to appeals and stay of execution shall, with any necessary modifications, apply to civil proceedings by or against the Government as they apply B to proceedings between subjects.

In my opinion, since s 73 of the Courts of Judicature Act 1964 — which has been discussed earlier — provides that an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders, and since there C is no record that the defendants have obtained a stay of execution, I cannot see how it can be contended by the learned State Legal Adviser that the SAR had made a wrong decision when he issued the certificate. The said s 73 clearly applies to proceedings by or against the government and that being so, I cannot fathom the contention of the learned State Legal Adviser that the certificate can only be issued if the judgment is final and D conclusive and all avenues for appeal have been exhausted. Incidentally, he did not produce any authority to support such a contention. To me, the certificate can be issued notwithstanding an appeal has been filed by the defendants unless at the hearing of the application before the SAR, the defendants have obtained a stay of execution.

E In relation to the proviso to s 33(3) of the GPA, counsel for the plaintiffs had contended that only the trial judge may direct that, pending the appeal, payment of the whole of any amount so payable shall be suspended — he submitted that the words 'the court by which any such order as aforesaid is made' appearing in that provision refers only to the F trial judge and not any other High Court judge. With respect, I cannot agree. The word 'court' is not defined in the GPA. However, s 66 of the Interpretation Acts 1948 and 1967 which would be relevant here, provides the word 'court' means 'any court of the Federation of competent jurisdiction'. In the light of that definition, I would hold that any judge of the High Court would fall within the contemplation of the words 'the G court by which any such order as aforesaid is made' and that those words would not necessarily restrict themselves to mean only the particular trial judge who made the order.

Be that as it may, it must be remembered that the only question which need to be determined at this appeal is whether the SAR was wrong H in issuing the certificate. I would think that the reason that he gave for allowing the application, namely, that there is no record of any appeal being filed by the defendants, has no bearing upon the matter before him. Pursuant to s 33(1) of the GPA, he has to issue the certificate since the application was made after the expiration of 21 days from the date of the order of the trial judge. Since there was no order for a stay neither was I there a direction from the court that the payment of the whole of any amount so payable be suspended, I cannot see how the certificate issued by the SAR can be said to be inappropriate or was wrong in law. Under such circumstances, I would dismiss this appeal with costs.

Incidentally, I am of the view that the contention of the learned State Legal Adviser with regard to O 73 r 12(1) of the Rules of the High Court 1980 is a non-issue. That rule provides that nothing in Orders 45–52 of the Rules shall apply in respect of any order against the government. Those orders deal with the following matters:

(i) Order 45 — Enforcement of judgments and orders.
(ii) Order 46 — Writs of execution.
(iii) Order 47 — Writ of seizure and sale.
(iv) Order 48 — Examination of judgment debtors, etc.
(v) Order 49 — Garnishee proceedings.
(vi) Order 50 — Charging orders, stop orders, etc.
(vii) Order 51 — Receivers: Equitable execution.
(viii) Order 51A — Rateable distribution.
(ix) Order 52 — Committal.

To me, the issuance of the certificate under s 33(1) of the GPA has nothing to do with the above orders which are basically rules of procedure in relation to enforcements of judgments and orders, execution, seizure and sale, etc and O 73 r 12(1) is clearly in accordance with s 33(4) of the GPA which provides that 'save as aforesaid no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any such money as aforesaid ...'. The words 'save as aforesaid' clearly exclude the act of issuing a certificate under the said s 33(1) of the GPA.

Appeal dismissed.

Reported by Jafisah Jaafar